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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COLOCATION AMERICA, INC., et al., Plaintiffs and Appellants, v. ARCHIE GARGA-RICHARDSON, Defendant and Respondent.	B236873 (Los Angeles County Super. Ct. No. BC448509)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Fruin, Judge. Affirmed.

Sigelman Law Firm, Paul Sigelman for Plaintiffs and Appellants.

Van Susteren Law Group, Adam Van Susteren for Defendant and Respondent.

Appellants sued respondent for posting a comment on the Internet criticizing appellants' business. The trial court struck appellants' complaint as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Colocation America, Inc. (Colocation America) and its owner Albert Ahdoot filed suit against Archie Garga-Richardson[2] in October 2010, claiming that Garga-Richardson committed trade libel by publishing statements that falsely portrayed plaintiffs as deceitful.[3] Plaintiffs' complaint was bare-bones. It tersely alleged that "[o]n one or more occasions" Garga-Richardson published statements saying: "'When dealing or conducting business with Mr. Albert Ahdoot dba Colocation America, Inc…and his related businesses or data centers, please exercise CAUTION AND CARE as Mr. Ahdoot is not a man of his word.'"

Garga-Richardson responded to the complaint by filing a motion to strike under the anti-SLAPP statute. He argued that he had a constitutional right "to inform the public of Plaintiffs' business practices," and that he had done so by publishing his experience with Colocation America and Ahdoot on his personal website, ScamFraudAlert.com.

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[1] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

[2] The complaint named two other defendants besides Garga-Richardson: Premier Financial & Accounting Services LLC and Scam Fraud Alert. Scam Fraud Alert is not a company, but merely the name of a website operated by Garga-Richardson. Premier Financial & Accounting Services LLC appears to be a business owned by Garga-Richardson, but the complaint contained no charging allegations against it. For ease of reference, defendants are collectively referred to as Garga-Richardson in this opinion.

[3] The complaint also pled two causes of action for interference with economic advantage. However, no mention was made of these causes of action in plaintiffs' opening brief, and therefore any challenge to the trial court's order striking these causes of action was forfeited. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["Courts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge."].)

Garga-Richardson characterized his website as promoting "consumer protection and awareness." He contended that the site was a public forum and that the services offered by plaintiffs were a matter of public interest, and therefore plaintiffs' complaint, which was premised upon Garga-Richardson's protected speech, implicated the anti-SLAPP statute. He further argued that plaintiffs were not reasonably likely to prevail on their claims against him.

Plaintiffs opposed the motion by arguing that their complaint did not concern an issue of public interest. They further argued that Garga-Richardson was the party who was "not a man of his word" because he had previously lost a lawsuit brought by plaintiffs. The court in that prior lawsuit found that Garga-Richardson entered into a "colocation contract" with Colocation America, and that he breached the contract's "Acceptable Use Policy" by causing a denial-of-service attack that resulted in a breakdown of Colocation America's network. Plaintiffs contended that they would prevail on their claim of trade libel by showing that they *do* keep their word, and that their business was damaged by Garga-Richardson's false representations.

The trial court granted Garga-Richardson's motion to strike in September 2011. The court determined that Garga-Richardson's postings[4] were made in connection with a matter of public interest based on evidence that Colocation America operates out of 300 data centers worldwide and it has issued press releases touting its capabilities and "uptime." The court found that Garga-Richardson's postings were addressed to the community of people looking for server hosting, and that they were published over an Internet site dedicated to exposing consumer frauds. The court further concluded that plaintiffs presented insufficient evidence to show a likelihood of prevailing on their claims.

Plaintiffs timely appealed.

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[4] In addition to posting his statement about plaintiffs on his website, Garga-Richardson also posted the statement on his personal blog, as well as the website RipoffReport.com.

DISCUSSION

I. Appeal and Review

Appeal lies from the order granting Garga-Richardson's motion to strike under the anti-SLAPP statute. (§ 425.16, subd. (i).) The trial court's ruling is subject to de novo review. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Paulus v. Bob Lynch Ford, Inc.*, *supra*, 139 Cal.App.4th 659, 670; § 425.16, subd. (a); *Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) There are two components to a motion to strike brought under section 425.16. First, the defendant must show that the claim arises from his exercise of the right to free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects constitutional rights, the court determines if there is a reasonable probability that the plaintiff will prevail on the merits of his claims. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) To protect First Amendment rights, the anti-SLAPP statute must "be construed broadly." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

III. Protected Activity

Garga-Richardson relies on two of the four categories covered by the anti-SLAPP statute. He argues that his Internet posting was protected as a "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," or was "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(3)-(4).) In their briefs, the parties primarily concentrate on the first of these two categories.

Neither side seriously disputes that Garga-Richardson's statement met the "public forum" requirement of section 425.16, subdivision (e)(3). His Internet postings were

freely available to be viewed by the general public. It is by now well established that statements made on websites readily accessible to the public are considered statements made in a public forum. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 896-897; *Ampex Corp. v. Cargle* (2005) 128 Cal App.4th 1569, 1576; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007.)

The more germane question is whether the statement was made "in connection with an issue of public interest." An issue of public interest is "*any issue in which the public is interested*. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute." (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.)

In arguing that Garga-Richardson's statement did not involve a public interest issue, plaintiffs rely on a holding from *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570: "'The fact that "a broad and amorphous public interest" can be connected to a specific dispute is not sufficient to meet the statutory requirements' of the anti-SLAPP statute." Plaintiffs contend that they provided evidence supporting their argument that a public interest issue was not implicated by showing that (i) Ahdoot is not a public individual and did not seek public attention; (ii) the activity involved was the damage caused by Garga-Richardson to Colocation's network; and (iii) the dispute only involved a private controversy.

It appears that, by way of declaration, Garga-Richardson presented evidence showing that Colocation America has quite a large scope of operations and customers, that it operates out of 300 data centers worldwide, and that it has over 8,000 customers. It also appears that the trial court relied on at least some of this evidence in determining that Garga-Richardson's statement involved an issue in which the public is interested. But, in designating the record for appeal, plaintiffs omitted Garga-Richardson's declaration and the attached evidence. "'[A] record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be

affirmed.'" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435, quoting *Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.) Because plaintiffs failed to provide to this Court all the trial court evidence relevant to the issue of whether Garga-Richardson's statement involved an issue of public interest, we are unable to reverse.

In any event, even if all relevant papers had been presented, we discern no grounds for reversal. Case law demonstrates that the public interest requirement of the anti-SLAPP statute may be satisfied even when a statement pertains to conduct between private individuals. (See *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465 [finding that anti-SLAPP statute applied to communications regarding fitness of elementary school basketball coach]; *Terry v. Davis Community Church* (2005) 131 Cal.App. 4th 1534, 1547 [anti-SLAPP statute applied to communications regarding inappropriate behavior of church youth group leaders].)

The recently published case of *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138 involved a series of derogatory statements about the plaintiff and his forensics business which were posted by the mother of the plaintiff's former girlfriend on the website "Ripoff Report." The defendant's statements included "'You should be scared. This guy is a criminal and a deadbeat dad. . . . I would be very careful dealing with this guy. He uses people, is into illegal activities, etc. I wouldn't let him into my house if I wanted to keep my possessions or my sanity.'" (*Id.* at p. 1142.) The defendant further accused the plaintiff of picking up streetwalkers and homeless drug addicts. (*Ibid.*) In finding that the trial court properly granted the defendant's anti-SLAPP motion, the Court of Appeal wrote: "We also have little difficulty finding the statements were of a public interest. The statements posted to the 'Ripoff Report' Web site about Chaker's character and business practices plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness." (*Id.* at p.1146.)

The statement at issue here was more clearly connected to an issue of public interest than the statements in *Chaker v. Mateo*. Consumer information is generally

viewed as a matter of public interest. (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 898.) The server hosting provided by Colocation America potentially attracted a large number of possible customers, since many if not most businesses now rely on servers for storing data and facilitating Internet connectivity. A comment (whether fair or not) on the business practices and honesty of a server hosting provider is indisputably a form of consumer information, and it therefore concerns a matter of public interest.

IV. Probability of Prevailing on the Merits

Once the first prong of an anti-SLAPP motion is satisfied, the burden shifts to the party asserting the cause of action to establish a probability of prevailing. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 213.) If the claim stated in the pleading is supported by sufficient prima facie evidence, it is not subject to being stricken as a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93; *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 738; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498.)

In ruling on the second prong of an anti-SLAPP motion, the court "considers the pleadings and the supporting and opposing affidavits stating facts on which the liability or defense is based." (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 901.) In their complaint, plaintiffs alleged that Garga-Richardson committed trade libel by publishing his statement that Ahdoot was "not a man of his word."[5]

"Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 572). The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.'

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[5] On appeal, plaintiffs contend that Garga-Richardson made other offensive statements, including that Ahdoot "manufactures law suits." In making an anti-SLAPP motion, Garga-Richardson was only required to respond to the complaint as framed by the pleadings, and thus other statements that he may have made were not properly at issue and will not be addressed here.

(*Ibid.*)" (*ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at p. 1010.) A statement must be false to constitute trade libel. (*Ibid.*) Mere opinions do not suffice. (*Id.* at p. 1011.)

The trial court found that plaintiffs failed to show that they had a reasonable probability of prevailing. We agree with its determination that plaintiffs did not establish that Garga-Richardson's statement was false, a necessary component of a trade libel claim. In trying to show falsity, plaintiffs relied on the judgment in the prior case finding that Garga-Richardson had breached the "colocation contract's" "Acceptable Use Policy." This judgment was properly found inconsequential by the trial court. It did not establish that Ahdoot was "a man of his word," a statement that, in any event, was clearly no more than opinion. (See *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 697 [noting that "[n]ot only commentators, but courts as well have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts"]; *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at pp. 1011-1013 [hyperbolic, informal, and disparaging Internet postings "lacked the characteristics of typical fact-based documents"].)

The trial court also properly found that plaintiffs' claim failed on another ground—they did not present proof that they suffered actual, pecuniary harm. Pecuniary loss is an element of a trade libel cause of action. To establish pecuniary loss, a plaintiff must identify specific transactions and customers that were lost because of the trade libel; general damages are not recoverable. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 109-110; *Leonardini v. Shell Oil Co.*, *supra*, 216 Cal.App.3d at p. 573; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73.) In an attempt to show pecuniary harm, plaintiffs presented an e-mail, apparently received from a potential customer, stating: "I no longer have a need for your business, especially after reading this." The e-mail contained a link to the statement posted by Garga-Richardson. This e-mail was insufficient to show pecuniary loss. It is clear that the writer, who "no longer" had "a need" for plaintiffs' business, would not have purchased services even if he had not seen Garga-Richardson's posting. Furthermore, the evidence presented was insufficient to

show that, prior to seeing the posting, the writer was certain or even likely to purchase services. Because plaintiffs had no probability of prevailing on their trade libel claim, the anti-SLAPP motion was rightly granted.

V. Attorney Fees

Garga-Richardson is entitled by statute to recover attorney fees and costs he incurred in the trial court[6] and on appeal as the prevailing party on his anti-SLAPP motion.[7] The amount of fees and costs is to be determined by the trial court upon Garga-Richardson's motion. (§ 425.16, subd. (c)(1); *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1446.)

DISPOSITION

The order granting the anti-SLAPP motion is affirmed. Garga-Richardson is entitled to recover his attorney fees and costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.

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[6] It appears that Garga-Richardson may not have incurred any fees or costs in the trial court, as he was acting in propria persona and apparently obtained fee waivers.

[7] Plaintiffs incorrectly contend that Garga-Richardson waived his right to attorney fees. One case they cite for this proposition, *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 288, is distinguishable because the issue before the court was whether an unmeritorious anti-SLAPP motion was frivolous or solely intended to cause delay, which was not at issue here. The other case cited by plaintiffs, *Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, did not involve an anti-SLAPP motion.